

TEMPORARY SERVICES AND EMPLOYEE LEASING INDUSTRIES

Employment occurs when an employer engages the services of an employee for pay. Under the California Unemployment Insurance Code (CUIC), "employee" is defined as any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. In general, a worker is a common law employee when the employer has the right to direct and control the manner and means of accomplishing the desired result.

Section 606.5 CUIC specifies who shall be considered the employer of common law employees in the temporary services and the employee leasing industries.

Who Are Temporary Services Agencies or Employee Leasing Agencies, and Are They the Employers of the Workers They Place in Employment?

In order to determine who is the actual employer of the worker, specific criteria must be met. First, the worker must be an employee under the common law rules. If a worker is a common law employee, then the employer must be identified.

A temporary services employer and an employee leasing employer are employing units that contract with clients or customers to supply WORKERS to perform services for the client or customer and perform ALL of the following functions:

- 1) Negotiate with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.
- 2) Determine assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
- 3) Retain the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.
- 4) Assign or reassign the worker to perform services for a client or customer.
- 5) Set the rate of pay of the worker, whether or not through negotiation.
- 6) Pay the worker from their own account or accounts.

- 7) Retain the right to hire and terminate workers.

If an individual or entity contracts to supply workers to perform services for a customer or client and ALL of the above seven functions are met, the individual or entity is the employer of the workers who perform the services and is required to pay unemployment insurance (UI) contributions and employment training tax (ETT). Additionally, the individual or entity is required to withhold state disability insurance (SDI) and California personal income tax (PIT) from the wages of the employee.

Examples

A temporary service company hired employee inspectors to provide quality assurance inspection services to buyers of electronic components. The inspectors performed services in suppliers' plants by following test procedures specified in purchase orders issued by the buyers. The temporary services company performed the following functions:

- Negotiated with clients (buyers) for time, place, type of work, and price of the service.
- Assigned inspectors to perform services for clients.
- Determined assignments of inspectors.
- Retained the authority to assign or reassign inspectors to other clients when an inspector was not satisfactory to a particular client.
- Set the rate of pay of the inspectors.
- Paid the inspectors directly from its business account(s).
- Retained the right to hire and terminate the inspectors.

The company providing inspection workers was the employer responsible for reporting because it performed all the functions as specified in Section 606.5 of the CUIC (refer to California Unemployment Insurance Appeals Board Tax Decision T-86-27). NOTE: Section 4304-1 of the California Code of Regulations referred to in T-86-27 has since been incorporated into Section 606.5 of the CUIC.

Under What Circumstances Is the Client or Customer of the Agency the Employer of the Workers?

If an individual or entity who contracts to supply workers to perform services for a customer or client is not a leasing employer or temporary services employer (as described above), the client or customer would be the employer for UI/SDI/ETT and PIT purposes. If the individual or entity contracting to provide the worker pays the worker, the individual or entity would merely be the agent for the client or customer who would still be the employer. Refer to Section 606.5(c) CUIIC.

When Employers Loan Employees to Other Employers, Who Is the Employer of the Loaned Employees?

In circumstances where an employee is loaned by one employer to another employer, the loaning employer remains the employer responsible for paying UI and ETT, and withholdings DI and PIT, if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. However, if the employer to whom the employee is loaned pays remuneration directly to the employee for services performed, that employer shall be considered the responsible employer for tax purposes for any remuneration paid to the employee by such employer. This is true regardless of whether the loaning employer also pays remuneration to the employee. Refer to Section 606.5(d) CUIIC.

Who is the Employer of a Domestic Worker placed by an Employment Agency?

Effective January 1, 1994, any Employment Agency defined in Section 1812.501 of the Civil Code will not be the employer of a domestic worker it placed in employment in a private home if certain factors exist. First, it must be established that the domestic worker is/was an employee under common-law rules. Then, it must be determined whether or not the business referring the worker is an employment agency as defined in the Civil Code:

- 1) "Any person who, for a fee or other valuable consideration, procures, offers, promises, provides, or attempts to procure babysitting or domestic employment for others or domestics or babysitters for others," or
- 2) "'Domestic agency' means any agency that provides, or attempts to provide employment by placement of domestic help in private homes."

If the domestic worker is/was a common-law employee and the company is an employment agency as defined

in the Civil Code, Section 687.2 of the CUIIC must be applied to determine whether or not the company is the employer of the domestic worker. Section 687.2 states an employment agency will not be the employer of a domestic worker if all of the following factors exist:

- There is a signed agreement between the employment agency and the domestic worker specifying:
 - (1) the agency will assist the worker in securing work,
 - (2) how the agency's referral fee will be paid and
 - (3) the domestic worker is free to sign with other employment agencies.
- The domestic worker informs the employment agency of his/her availability to work and the conditions under which they will work, and the worker can reject any assignment.
- The domestic worker is free to renegotiate with the client the amount proposed to be paid for the work.
- The domestic worker does not receive training from the employment agency regarding the performance of the work.
- The domestic worker performs work without any direction, control, or supervision exercised by the employment agency.
- The employment agency does not provide tools, supplies, or equipment necessary to perform the work.
- The domestic worker is not required to pay the employment agency and the agency is not required to pay the worker if the client fails to pay for the services performed.
- Payments are made directly to the domestic worker or the employment agency. Payments made to the agency must be deposited into a trust account. Payments made to a worker cannot be made from the agency's business account.
- The working relationship between the domestic worker and the client can only be terminated by either party not the employment agency.

If it is determined using Section 687.2 of the CUIIC that the employment agency is not the employer of the domestic worker, the customer will be considered his/her employer. If the business is determined not to be an employment agency as defined in the Civil Code, the identity of the employer of a domestic worker will be determined using Precedent Tax Decision P-T-473 and Section 606.5 of the CUIIC.

Equal Opportunity Employer/Program. Auxilliary services and assistance available to persons with disabilities.
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